

**Dec 28, 2018**

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON**

ROBERT M,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:17-cv-00363-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 17, 18

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 17, 18. The parties consented to proceed before a magistrate judge. ECF No. 8. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's motion, ECF No. 17, and grants Defendant's motion, ECF No. 18.

**JURISDICTION**

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

## STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination."

1 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
2 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
3 *Sanders*, 556 U.S. 396, 409-10 (2009).

#### 4 **FIVE-STEP EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered “disabled” within  
6 the meaning of the Social Security Act. First, the claimant must be “unable to  
7 engage in any substantial gainful activity by reason of any medically determinable  
8 physical or mental impairment which can be expected to result in death or which  
9 has lasted or can be expected to last for a continuous period of not less than twelve  
10 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be  
11 “of such severity that he is not only unable to do his previous work[,] but cannot,  
12 considering his age, education, and work experience, engage in any other kind of  
13 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
14 1382c(a)(3)(B).

15 The Commissioner has established a five-step sequential analysis to  
16 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
17 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work  
18 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial  
19 gainful activity,” the Commissioner must find that the claimant is not disabled. 20  
20 C.F.R. § 416.920(b).

1 If the claimant is not engaged in substantial gainful activity, the analysis  
2 proceeds to step two. At this step, the Commissioner considers the severity of the  
3 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from  
4 "any impairment or combination of impairments which significantly limits [his]  
5 physical or mental ability to do basic work activities," the analysis proceeds to step  
6 three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy this  
7 severity threshold, however, the Commissioner must find that the claimant is not  
8 disabled. 20 C.F.R. § 416.920(c).

9 At step three, the Commissioner compares the claimant's impairment to  
10 severe impairments recognized by the Commissioner to be so severe as to preclude  
11 a person from engaging in substantial gainful activity. 20 C.F.R. §  
12 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the  
13 enumerated impairments, the Commissioner must find the claimant disabled and  
14 award benefits. 20 C.F.R. § 416.920(d).

15 If the severity of the claimant's impairment does not meet or exceed the  
16 severity of the enumerated impairments, the Commissioner must pause to assess  
17 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
18 defined generally as the claimant's ability to perform physical and mental work  
19 activities on a sustained basis despite his limitations, 20 C.F.R. § 416.945(a)(1), is  
20 relevant to both the fourth and fifth steps of the analysis.

1 At step four, the Commissioner considers whether, in view of the claimant's  
2 RFC, the claimant is capable of performing work that he performed in the past  
3 (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable of  
4 performing past relevant work, the Commissioner must find that the claimant is not  
5 disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing such  
6 work, the analysis proceeds to step five.

7 At step five, the Commissioner considers whether, in view of the claimant's  
8 RFC, the claimant is capable of performing other work in the national economy.  
9 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner  
10 must also consider vocational factors such as the claimant's age, education and  
11 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of  
12 adjusting to other work, the Commissioner must find that the claimant is not  
13 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to  
14 other work, analysis concludes with a finding that the claimant is disabled and is  
15 therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

16 The claimant bears the burden of proof at steps one through four above.  
17 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
18 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
19 capable of performing other work; and (2) such work "exists in significant  
20

1 numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,  
2 700 F.3d 386, 389 (9th Cir. 2012).

### 3 **ALJ’S FINDINGS**

4 On October 23, 2014, Plaintiff applied for Title XVI supplemental security  
5 income benefits alleging a disability onset date of September 14, 2013. Tr. 91,  
6 291-96. The application was denied initially, Tr. 224-27, and on reconsideration,  
7 Tr. 231-33. Plaintiff appeared before an administrative law judge (ALJ) on July  
8 20, 2016. Tr. 81-132. On August 30, 2016, the ALJ denied Plaintiff’s claim. Tr.  
9 18-35.

10 At step one of the sequential evaluation process, the ALJ found Plaintiff has  
11 not engaged in substantial gainful activity since October 23, 2014. Tr. 24. At step  
12 two, the ALJ found that Plaintiff has the following severe impairments: bilateral  
13 degenerative joint disease of the knees, sleep apnea, asthma, obesity,  
14 gastroesophageal reflux disease (GERD), ulcerative reflux esophagitis, irritable  
15 bowel syndrome (IBS), fibromyalgia, affective disorder, and anxiety. Tr. 24.

16 At step three, the ALJ found Plaintiff does not have an impairment or  
17 combination of impairments that meets or medically equals the severity of a listed  
18 impairment. Tr. 25. The ALJ then concluded that Plaintiff has the RFC to perform  
19 sedentary work with the following limitations:  
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1 occasional climbing of ramps, stairs, and scaffolds; occasional  
2 balancing; and rare stooping, crouching, kneeling or crawling more  
3 than 15% of the time. [Plaintiff] will need a sit-stand option hourly  
4 for 5 minutes while at a workstation, and will use a hand held assistive  
5 device. [Plaintiff] can have occasional exposure to extreme cold,  
6 heat, and humidity; and occasional exposure to excessive vibrations,  
7 irritants, poor ventilation, moving machinery, and unprotected  
8 heights. [Plaintiff] must work in a position requiring no more than  
9 frequent routine judgment, defined as making simple work related  
10 decisions, and frequent simple workplace changes. [Plaintiff] needs  
11 work that requires no more than frequent exposure to the public, and  
12 no working in crowds. [Plaintiff] can frequently interact with  
13 supervisors and coworkers, and is unable to work at production rate  
14 jobs.

15 Tr. 27.

16 At step four, the ALJ found Plaintiff is able to perform past relevant work as  
17 a telephone solicitor. Tr. 33. In the alternative, at step five, the ALJ found that,  
18 considering Plaintiff's age, education, work experience, RFC, and testimony from  
19 the vocational expert, there were additional jobs that existed in significant numbers  
20 in the national economy that Plaintiff could perform, such as, charge account clerk  
and printed circuit board assembly. Tr. 35. Therefore, the ALJ concluded Plaintiff  
was not under a disability, as defined in the Social Security Act, from the alleged  
onset date of October 23, 2014, though the date of the decision. Tr. 35.

On September 15, 2017, the Appeals Council denied review of the ALJ's  
decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for  
purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

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1. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
2. Whether the ALJ properly evaluated the medical opinion evidence.

ECF No. 17 at 1, 4.

### A. Plaintiff's Symptom Claims

An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms. SSR 16–3p, 2016 WL 1119029, at \*2.<sup>1</sup> “First, the ALJ must determine whether there is objective

<sup>1</sup> At the time of the ALJ's decision on March 25, 2016, the regulation that governed the evaluation of symptom claims was SSR 16-3p, which superseded SSR 96-7p effective March 24, 2016. SSR 16-3p; Titles II and XVI: Evaluation of Symptoms in Disability Claims, 81 Fed. Reg. 15776, 15776 (Mar. 24, 2016). The



1 medical evidence of an underlying impairment which could reasonably be  
2 expected to produce the pain or other symptoms alleged.” *Molina*, 674 F.3d at  
3 1112. “The claimant is not required to show that [his] impairment could  
4 reasonably be expected to cause the severity of the symptom [he] has alleged; [he]  
5 need only show that it could reasonably have caused some degree of the  
6 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

7 Second, “[i]f the claimant meets the first test and there is no evidence of  
8 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
9 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
10 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
11 omitted). General findings are insufficient; rather, the ALJ must identify what  
12 symptom claims are being discounted and what evidence undermines these claims.  
13 *Id.*; *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v. Barnhart*, 278  
14 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why he  
15 discounted claimant’s symptom claims). “The clear and convincing [evidence]  
16 standard is the most demanding required in Social Security cases.” *Garrison v.*

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18 ALJ’s decision did not cite SSR 16-3p, but cited SSR 96-4p, which was rescinded  
19 effective June 14, 2018, in favor of the more comprehensive SSR 16-3p. Neither  
20 party argued any error in this regard.

1 *Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec.*  
2 *Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

3 Factors to be considered in evaluating the intensity, persistence, and limiting  
4 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
5 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
6 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
7 side effects of any medication an individual takes or has taken to alleviate pain or  
8 other symptoms; 5) treatment, other than medication, an individual receives or has  
9 received for relief of pain or other symptoms; 6) any measures other than treatment  
10 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
11 factors concerning an individual’s functional limitations and restrictions due to  
12 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §  
13 416.929(c)(1)-(3). The ALJ is instructed to “consider all of the evidence in an  
14 individual’s record,” “to determine how symptoms limit ability to perform work-  
15 related activities.” SSR 16-3p, 2016 WL 1119029, at \*2.

16 While the ALJ determined that Plaintiff’s medically determinable  
17 impairments could reasonably be expected to cause some of the alleged symptoms,  
18 the ALJ discounted Plaintiff’s claims concerning the intensity, persistence, and  
19 limiting effects of the symptoms. Tr. 29.

1           *1. Inconsistent with the Objective Medical Evidence*

2           The ALJ found that the severity of Plaintiff's reported physical and mental-  
3 health symptoms were unsupported by the objective medical evidence. Tr. 29-30.  
4 An ALJ may not discredit a claimant's symptom testimony and deny benefits  
5 solely because the degree of the symptoms alleged is not supported by objective  
6 medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001);  
7 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d  
8 597, 601 (9th Cir. 1989). However, the medical evidence is a relevant factor in  
9 determining the severity of a claimant's symptoms and their disabling effects.  
10 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). Here, as  
11 detailed by the ALJ, the objective medical evidence is inconsistent with Plaintiff's  
12 disabling claims. For instance, the medical notes from a May 2013 examination  
13 stated that Plaintiff did not have joint deformity, swelling, erythema, heat, or  
14 effusion, and he retained full range of motion bilaterally. Tr. 468. These notes  
15 also stated that Plaintiff's range of motion was limited by his body mass, not his  
16 joints. Tr. 468. In addition, imaging in May 2013 reflected only mild bilateral  
17 bicompartamental osteoarthritis. Tr. 491. Regarding Plaintiff's asthma, tests and  
18 imaging reflected no acute cardiopulmonary disease and sinus rhythm was within  
19 normal limits. Tr. 496, 843, 1318. The ALJ also pointed to the objective medical  
20 evidence related to Plaintiff's sleep disorder, chronic pain, gastrointestinal and

1 bowel impairments. *See, e.g.*, Tr. 1562 (reporting that he is sleeping better); Tr.  
2 476 (noting normal balance and gait and no skeletal tenderness or deformity); Tr.  
3 543 (noting that Plaintiff ambulated down the hallway with no limp or pain  
4 behaviors); Tr. 560 (noting negative gastric emptying). The ALJ also highlighted  
5 the medical records that were inconsistent with Plaintiff's claim that his anxiety  
6 was disabling. *See, e.g.*, Tr. 536, 567-68 (Plaintiff's judgment, insight, reasoning,  
7 and attention are good, as well as affect appropriate and attitude cooperative.); Tr.  
8 979 (noting that affect, judgment, and mood were normal); Tr. 1535, 1559 (noting  
9 that mood, affect, judgment, and memory were normal). It was the ALJ's role to  
10 weigh the evidence. *Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 599-600  
11 (9th Cir. 1999). The ALJ's finding that the objective medical evidence is  
12 inconsistent with Plaintiff's claim that his physical and mental conditions were  
13 disabling is rationale and supported by substantial evidence.

14 Plaintiff submits that the ALJ's statement that "the new and material  
15 evidence presented by [Plaintiff] for the instant proceeding warrants not adopting  
16 the [RFC] from" Plaintiff's prior disability-application opinion, contradicts the  
17 ALJ's finding that Plaintiff's conditions are not as disabling as Plaintiff claims.  
18 ECF No. 17 at 12 (citing Tr. 28). This argument is unpersuasive. The ALJ's  
19 finding that Plaintiff had additional severe impairments necessitating a new RFC is  
20 not inconsistent with the ALJ's finding that Plaintiff's reported symptoms were not

1 as severe has he claimed. The step-two assessment of severe impairments is a  
2 different assessment than the extent to which the severe impairments restrict the  
3 Plaintiff's residual functional capacity—a step-three assessment. 20 C.F.R. §§  
4 416.920, 416.945(a).

5 *2. Improvement with Treatment*

6 The ALJ also found that Plaintiff's reported symptoms improved with  
7 treatment. Tr. 29. The effectiveness of treatment is a relevant factor in  
8 determining the severity of a claimant's symptoms. 20 C.F.R. § 404.1529(c)(3)  
9 (2011); *see Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.  
10 2006); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (A favorable  
11 response to treatment can undermine a claimant's complaints of debilitating pain or  
12 other severe limitations.). Here, the ALJ noted that Plaintiff's depression  
13 symptoms and sleep disorders improved with medication. Tr. 29 (citing Tr. 487  
14 ("You are improving very nicely."); Tr. 489-90 (noting that Plaintiff's affect was  
15 improved given the medication change); Tr. 521 (noting improving in overall  
16 appearance and that Plaintiff is not anxious). Likewise, the ALJ found that  
17 Plaintiff's physical pain was treated effectively with medication. Tr. 30 (citing Tr.  
18 487-89). The ALJ reasonably concluded that the record showed a history of  
19 improvement with treatment: improvement which was inconsistent with the level  
20

1 of impairment Plaintiff alleged. This was a clear and convincing reason to  
2 discount Plaintiff's symptom claims.

3 *3. Failure to Follow Treatment Recommendations*

4 The ALJ discounted Plaintiff's reported symptoms because he did not  
5 pursue recommended treatment. Tr. 30. Unexplained, or inadequately explained,  
6 failure to seek treatment or follow a prescribed course of treatment may serve as a  
7 basis to discount the claimant's reported symptoms, unless there is a good reason  
8 for the failure. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). Here, the ALJ  
9 noted that Plaintiff failed to participate in the recommended healthy living  
10 workshop because, as Plaintiff reported, he "has just been sort of lazy and has not  
11 started it yet." Tr. 30 (citing Tr. 567). Also contrary to his providers'  
12 recommendations, Plaintiff was not interested in exercising or changing his eating  
13 habits. Tr. 1562, 1567. This record supports a finding that Plaintiff did not follow  
14 a prescribed course of treatment.

15 But relying on Yvonne Belcourt's opinion, Plaintiff submits that Plaintiff's  
16 treatment noncompliance was due to his affective disorder and anxiety disorder  
17 and therefore his noncompliance should not be used as a basis to discount his  
18 reported symptoms. ECF No. 17 at 12 (citing Tr. 446 and *Nguyen v. Chater*, 100  
19 F.3d 1462, 1465 (9th Cir. 1996)). However, as is discussed below, Ms. Belcourt  
20 stated that Plaintiff's physical condition—not his mental condition—contributed to

1 his untidy living conditions. Therefore, Ms. Belcourt’s statements do not support  
2 an argument that Plaintiff’s treatment noncompliance was the result of his mental  
3 health condition rather than a deliberate choice. The ALJ’s interpretation of the  
4 record—that Plaintiff was not motivated to participate in treatment—is a rational  
5 interpretation. The ALJ’s conclusion is entitled to deference. *See Orn*, 495 F.3d at  
6 632 (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)); *see*  
7 *also Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) (noting “[w]here  
8 evidence is susceptible to more than one rational interpretation,” the ALJ’s  
9 conclusion will be upheld).

10 In sum, the ALJ cited specific, clear, and convincing reasons to discount  
11 Plaintiff’s symptom claims.

## 12 **B. Medical Opinion Evidence**

13 Plaintiff faults the ALJ for improperly rejecting the opinions of treating  
14 physician Marven Cabling, M.D.; examining psychologist John Arnold, Ph.D.; and  
15 caregiver Yvonne Belcourt. ECF No. 17 at 5-10.

16 There are three types of physicians: “(1) those who treat the claimant  
17 (treating physicians); (2) those who examine but do not treat the claimant  
18 (examining physicians); and (3) those who neither examine nor treat the claimant  
19 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”  
20 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).

1 Generally, a treating physician's opinion carries more weight than an examining  
2 physician's opinion, and an examining physician's opinion carries more weight  
3 than a reviewing physician's opinion. *Id.* at 1202.

4 If a treating or examining physician's opinion is uncontradicted, the ALJ  
5 may reject it only by offering "clear and convincing reasons that are supported by  
6 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
7 "However, the ALJ need not accept the opinion of any physician, including a  
8 treating physician, if that opinion is brief, conclusory, and inadequately supported  
9 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
10 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or  
11 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ  
12 may only reject it by providing specific and legitimate reasons that are supported  
13 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830–  
14 31).

15 The opinion of an acceptable medical source such as a physician or  
16 psychologist is given more weight than that of an "other source." *See* SSR 06-03p  
17 (Aug. 9, 2006), *available at* 2006 WL 2329939 at \*2; 20 C.F.R. § 416.927(a).  
18 "Other sources" include nurse practitioners, physician assistants, therapists,  
19 teachers, social workers, and other non-medical sources. 20 C.F.R. §§  
20 404.1513(d), 416.913(d) (2013). The ALJ need only provide "germane reasons"



1 for disregarding an “other source” opinion. *Molina*, 674 F.3d at 1111. However,  
2 the ALJ is required to “consider observations by nonmedical sources as to how an  
3 impairment affects a claimant’s ability to work.” *Sprague v. Bowen*, 812 F.2d  
4 1226, 1232 (9th Cir. 1987).

5 *1. Dr. Cabling*<sup>2</sup>

6 Dr. Cabling examined Plaintiff on four occasions between July 2015 and  
7 June 20, 2016 and diagnosed Plaintiff with chronic pain syndrome from  
8 fibromyalgia, sleep apnea, and obesity. Tr. 1334. Dr. Cabling opined that  
9 Plaintiff’s pain and stress would frequently interfere with his attention and  
10 concentration during a typical work day and estimated that Plaintiff could only sit  
11 for forty-five minutes, stand for thirty minutes, and walk for twenty minutes at a  
12 time. Tr. 1334-35. He also opined that Plaintiff needed to use a cane to walk, take  
13 one-two unscheduled breaks daily, be off task approximately fifteen-to-twenty  
14 percent of the workday, and miss at least two days per month due to his  
15 impairments. Tr. 1336-37.

16 The ALJ assigned this opinion partial weight. Tr. 32. Because Dr.  
17 Cabling’s opinion was contradicted by Patricia Kraft Ph.D., Tr. 164-65, the ALJ

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20 <sup>2</sup> The ALJ decision referred to Dr. Marven Cabling as “Marren Cablin.”

1 was required to provide specific and legitimate reasons for rejecting Dr. Cabling's  
2 opinion. *Bayliss*, 427 F.3d at 1216.

3 First, the ALJ gave partial weight to Dr. Cabling's opinion because Dr.  
4 Cabling noted that his opined functional assessments were "estimates." Tr. 32. A  
5 medical opinion may be rejected by the ALJ if it is conclusory or inadequately  
6 supported. *Bray*, 554 F.3d at 1228; *Thomas*, 278 F.3d at 957. An ALJ may  
7 permissibly reject functional assessments that are not supported by any  
8 explanation, treatment notes, or findings. *Crane v. Shalala*, 76 F.3d 251, 253 (9th  
9 Cir. 1996); *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983). Here, the ALJ  
10 noted that Dr. Cabling admitted that he was not able to provide a thorough  
11 evaluation of Plaintiff's functioning, noting that Dr. Cabling had only seen Plaintiff  
12 four times. Plaintiff submits the ALJ erred by discounting Dr. Cabling's opinion  
13 on the basis that Dr. Cabling had only treated Plaintiff four times. ECF No. 17 at  
14 7. Plaintiff's argument is without merit because, regardless of the number of times  
15 Dr. Cabling treated Plaintiff, Dr. Cabling himself noted that his functional  
16 assessments were merely "estimates" and that he was "not sure" how long Plaintiff  
17 could stand and walk in an eight-hour workday. Tr. 1335-37. Thus, that Dr.  
18 Cabling's functional assessments were estimates was a valid basis to discount the  
19 opined functional assessments. The ALJ provided a specific and legitimate reason  
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1 supported by substantial evidence to discount Dr. Cabling's functional  
2 assessments.

3       Second, the ALJ gave partial weight to Dr. Cabling's opinion that Plaintiff  
4 would be absent two days a month and unable to complete an eight-hour workday  
5 because these opinions were inconsistent with the objective medical evidence. Tr.  
6 32. Relevant factors to evaluating any medical opinion include the amount of  
7 relevant evidence that supports the opinion, the quality of the explanation provided  
8 in the opinion, and the consistency of the medical opinion with the record as a  
9 whole. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn*, 495 F.3d  
10 at 631. An ALJ may choose to give more weight to an opinion that is more  
11 consistent with the evidence in the record. 20 C.F.R. § 416.927(c)(4) ("[T]he more  
12 consistent an opinion is with the record as a whole, the more weight we will give to  
13 that opinion."). Here, the imaging of Plaintiff's abdominal, chest, and knees either  
14 were negative or showed only minor impairments. Tr. 491, 496, 843, 1318. The  
15 medical evidence does not indicate that Plaintiff's physical or mental impairments,  
16 singly or in combination, were of such severity to be disabling, when prescribed  
17 medication was taken and recommended eating and exercise performed. *See, e.g.*,  
18 Tr. 468, 476, 487, 489, 524, 536, 543, 560, 567-68, 979, 1284, 1535, 1559, 1562.  
19 To the extent there was conflicting evidence in the record, it was the ALJ's role to  
20 weigh the evidence. *See Morgan*, 169 F.3d at 599-600. There is substantial

1 objective medical evidence conflicting with Dr. Cabling's assessments that  
2 Plaintiff was unable to complete an eight-hour work day without additional breaks  
3 and would be absent two days a month. The ALJ provided specific and legitimate  
4 reasons supported by substantial evidence to discount Dr. Cabling's opinion.  
5 Moreover, the ALJ incorporated exertional functional limitations into the RFC,  
6 including, limiting Plaintiff to sedentary work with a sit-stand option hourly for  
7 five minutes and permitting the use of a hand-held assistive device. Tr. 27. *See*  
8 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008) ("[A]n ALJ's  
9 assessment of a claimant adequately captures restrictions . . . where the assessment  
10 is consistent with restrictions identified in the medical testimony.").

11       2. *Dr. Arnold*

12       Dr. Arnold completed three Psychological/Psychiatric Evaluation forms, Tr.  
13 505-08 (May 2013), Tr. 509-12 (April 2014), and Tr. 591-94 (January 2015). In  
14 2013, Dr. Arnold diagnosed Plaintiff with dysthymic disorder; anxiety, not  
15 otherwise specified with social phobia features; and rule out somatoform disorder.  
16 Tr. 506. In 2014 and 2015, Dr. Arnold diagnosed Plaintiff with dysthymic  
17 disorder; anxiety, not otherwise specified with obsessive compulsive disorder and  
18 social phobia features; and pain disorder with both psychological factors and a  
19 general medical condition. Tr. 510, 592. Dr. Arnold opined that Plaintiff was

1 largely moderately limited in non-exertional basic work activities but markedly  
2 limited in the following non-exertional basic work activities:

- 3 • 2013: perform activities within a schedule, maintain regular  
4 attendance, and be punctual within customary tolerances without  
5 special supervision, Tr. 507;
- 6 • 2014: understand, remember, and persist in tasks by following  
7 detailed instructions; perform activities within a schedule, maintain  
8 regular attendance, and be punctual within customary tolerances  
9 without special supervision, Tr. 511; and
- 10 • 2015: understand, remember, and persist in tasks by following  
11 detailed instructions; adapt to changes in a routine work setting; and  
12 complete a normal workday and workweek without interruptions  
13 from psychologically based symptoms, Tr. 593.

14 The ALJ assigned partial weight to these opinions. Tr. 31. Because Dr.  
15 Arnold's opinion was contradicted by Nancy Winfrey, Ph.D., Tr. 107-19, the ALJ  
16 was required to provide specific and legitimate reasons for rejecting Dr. Arnold's  
17 opinion. *Bayliss*, 427 F.3d at 1216.

18 First, the ALJ discounted Dr. Arnold's opinions because the medical  
19 evidence was not consistent with Dr. Arnold's functional assessments. Tr. 31. An  
20 ALJ may discredit physicians' opinions that are unsupported by the record as a

1 whole. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.  
2 2004). Here, the ALJ rationally found that Plaintiff's examinations showed  
3 minimal loss of psychiatric functioning resulting from his impairments and  
4 therefore were inconsistent with Dr. Arnold's marked restrictions. Tr. 31; *see, e.g.*,  
5 Tr. 536 (noting that Plaintiff's appearance and affect were appropriate, attitude  
6 cooperative, attention gained, and judgment and insight good); Tr. 568 (noting that  
7 memory is intact, attitude cooperative, attention gained, reasoning, judgment, and  
8 insight good); Tr. 979, 1535 (noting normal affect, judgment, and mood); Tr. 883-  
9 84, 1004, 1036-39 (noting negative for depression, and alert, orientated, and  
10 cooperative with staff). This was a specific and legitimate reason supported by  
11 substantial evidence to discount Dr. Arnold's opinions.

12 Second, the ALJ discounted Dr. Arnold's opinions because the opined  
13 limitations were inconsistent with Dr. Arnold's mental status examinations of  
14 Plaintiff. Tr. 31. An ALJ may reject opinions that are internally inconsistent or  
15 not supported by that source's data. *Nguyen*, 100 F.3d at 1464; *Tommasetti*, 533  
16 F.3d at 1041 (Incongruity between an opinion and treatment records or notes is a  
17 specific and legitimate reason to discount an opinion.). For instance, Plaintiff  
18 functioned within normal limits in all categories, including orientation, perception,  
19 concentration, abstract thoughts, insight, and judgment. Tr. 508, 512, 595. These  
20 normal abilities are inconsistent with Dr. Arnold's marked limitations. The

1 incongruity between Dr. Arnold's observations and opinions served as a legitimate  
2 and specific basis for the ALJ to discredit Dr. Arnold's opinions. And while  
3 Plaintiff's memory did not test within normal limits, Tr. 508, 512, 595, Plaintiff's  
4 memory deficient was incorporated into the RFC by limiting Plaintiff to jobs  
5 requiring simple work-related decisions and not at a production rate. Tr. 27. *See*  
6 *Stubbs-Danielson*, 539 F.3d at 1174.

7 Plaintiff submits that it is odd that the ALJ relied on the testimony of Dr.  
8 Winfrey over Dr. Arnold's opinion as Dr. Winfrey deferred "the question of  
9 [Plaintiff's] limitations of being off task to the treating physician." ECF No. 17 at  
10 8. However, Dr. Winfrey deferred to a treating physician in regard to whether  
11 Plaintiff's physical conditions caused pain to such extent that he would be off task  
12 as opined by Dr. Arnold. Tr. 115-16. As discussed above, the objective medical  
13 evidence supports the ALJ's finding that Plaintiff's physical conditions are not so  
14 severe that they would markedly restrict his non-exertional abilities.

15 The ALJ articulated specific and legitimate reasons for discounting Dr.  
16 Arnold's opinions.

17 *3. Ms. Belcourt*

18 Ms. Belcourt served as Plaintiff's caregiver for the State of Washington as  
19 an independent provider from 2015 through May 1, 2016. Tr. 446. Ms. Belcourt  
20 helped Plaintiff with his housekeeping, medication management, shopping, and

1 minor personal care. Tr. 446. Ms. Belcourt reported that when she began,  
2 Plaintiff's apartment was a mess because it was infested with bed bugs and  
3 unclean, and Plaintiff had "hoarding problems since he was not that mobile and did  
4 not leave his apartment that much because of medical issues." Tr. 446.

5 Ms. Belcourt is considered an "other source" under the regulations, 20  
6 C.F.R. § 416.913(d) (2013); thus, the ALJ was required to cite germane reasons for  
7 rejecting this opinion. *See Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993).

8 First, the ALJ discounted Ms. Belcourt's opinion because it was consistent  
9 with Plaintiff's subjective complaints, which were in turn inconsistent with the  
10 objective medical evidence. Tr. 32. Inconsistency with the medical evidence is a  
11 germane reason to reject an opinion from an "other source." *Bayliss*, 427 F.3d at  
12 1218; *Lewis v. Apfel*, 236 F.3d 503, 511-12 (9th Cir. 2001). And an ALJ may  
13 reject an "other source" opinion that essentially reproduces the claimant's  
14 discounted testimony. *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694  
15 (9th Cir. 2009). Here, because Ms. Belcourt's opinion about Plaintiff's inability to  
16 care for his home, shop, and perform minor personal care are, for the reasons  
17 summarized above, inconsistent with the level of impairment reflected in the  
18 objective medical evidence, the ALJ properly discounted Ms. Belcourt's opinion.  
19 *See Molina*, 674 F.3d at 1114; *Valentine*, 574 F.3d at 694. This was a germane  
20 reason to discount Ms. Belcourt's opinion.



1 Next, the ALJ also found the statements were essentially a repeat of  
2 Plaintiff's allegations, which had been properly rejected. A non-medical opinion  
3 may be rejected if it based on a claimant's subjective complaints which were  
4 properly discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001);  
5 *Morgan*, 169 F.3d at 602; *Fair*, 885 F.2d at 604. This was a germane reason to  
6 discount Ms. Belcourt's opinion.

7 Finally, the ALJ discounted Ms. Belcourt's opinion because she was not a  
8 disinterested party with medical training and expertise necessary to assess  
9 symptoms and their severity. Tr. 32. Defendant concedes these were not proper  
10 grounds to discount Ms. Belcourt's opinion. ECF No. 18 at 10; *see Smolen v.*  
11 *Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996); 20 C.F.R. § 404.1513(d) (2013)  
12 (directing the ALJ to consider evidence from other sources, including caregivers,  
13 about the claimant's impairments and how they affect the claimant's ability to  
14 work). Notwithstanding this concession, any error is harmless because the ALJ  
15 provided another germane reason, supported by substantial evidence, to discredit  
16 Ms. Belcourt's statements. *See Molina*, 674 F.3d at 1115.

## 17 CONCLUSION

18 Having reviewed the record and the ALJ's findings, the Court concludes the  
19 ALJ's decision is supported by substantial evidence and is free of harmful legal  
20 error. Accordingly, **IT IS HEREBY ORDERED:**

1           1. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is **DENIED**.

2           2. Defendant's Motion for Summary Judgment, **ECF No. 18**, is

3 **GRANTED.**

4           3. The Clerk's Office is to enter **JUDGMENT** in favor of Defendant.

5           The District Court Executive is directed to file this Order, provide copies to  
6 counsel, and **CLOSE THE FILE**.

7           DATED December 28, 2018.

8                               s/Mary K. Dimke

9                               MARY K. DIMKE

                              UNITED STATES MAGISTRATE JUDGE